

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADASSA MEAT CORPORATION	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through May 31, 1987.	:	

DETERMINATION

In the Matter of the Petition	:	
of	:	
ABDEL MUSTAFA	:	
AS OFFICER OF ADASSA	:	
MEAT CORPORATION	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through May 31, 1987.	:	

Petitioners, Adassa Meat Corporation and Abdel Mustafa, as officer of Adassa Meat Corporation, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through May 31, 1987 (File Nos. 806367 and 806368).

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 22, 1990 at 1:15 P.M. and continued to conclusion on July 31, 1990 at 9:15 A.M., with all briefs to be submitted by November 5, 1990. Petitioners appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether, having executed a consent to the fixing of tax due for the audit period subject

to a request for abatement of penalties, Adassa Meat Corporation is entitled to challenge either the tax assessed or penalties and additional interest imposed.

II. Whether the audit method employed has been shown to be capricious or unreasonable or the audit results have been proven to be incorrect.

III. Whether petitioners have shown that any failure to timely file accurate sales tax returns and pay the tax due was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

Petitioner Adassa Meat Corporation ("Adassa") operates a supermarket. Petitioner Abdel Mustafa is president of that corporation. In February 1986, the Division of Taxation ("Division") began a field audit of Adassa's business operations and sales records for the period March 1, 1983 through November 30, 1985. This audit followed on the heels of a decision of the former State Tax Commission which modified certain factors employed by the Division in a purchase markup audit, but otherwise upheld an audit of Adassa conducted for the period December 1, 1979 through February 28, 1983.¹

A letter dated February 19, 1986 was mailed to Adassa, scheduling a field audit appointment on March 10, 1986. Adassa's books and records were requested for the period March 1, 1983 through November 30, 1985,

including journals, ledgers, sales invoices, purchase invoices, cash register tapes, and exemption certificates.

In response to the audit appointment letter, the Division received a phone call from a Mr. Liss who identified himself as Adassa's accountant and asked that the appointment be postponed. This request was granted, and Mr. Liss was asked to file a power of attorney. Following several contacts with the Division, Mr. Liss advised the Division that he was no longer representing Adassa. In August 1986, the Division received a power of attorney from

¹Matter of Adassa Meat Corp. and Abdel Mustafa and Ahmed Mustafa, as Officers, State Tax Commission, October 22, 1985 (TSB-H-85[243]S).

Robert Greenblatt, a certified public accountant, who then assumed the role of Adassa's representative. During the next several months, the Division attempted to schedule an audit appointment with Mr. Greenblatt and to obtain waivers of the statutory period of limitation for assessing tax.

An auditor went to Mr. Greenblatt's office on December 22, 1986 to review Adassa's books and records. The only records available were sales tax returns for the sales tax quarters ended May 31, 1986, August 31, 1986 and November 30, 1986, with workpapers for the last two quarters, and bank statements covering approximately 17 months of the period from April 1985 through November 1986. Mr. Greenblatt stated that he began preparing Adassa's sales tax returns as of the period ended May 31, 1986. He was informed of the Division's intention to extend the audit period to November 30, 1986.

The Division sent a letter, dated January 15, 1987 to Adassa, requesting the following books and records for the period March 1, 1983 through November 30, 1986: cash receipts journals, cash disbursements journals, purchase journals, journal entries, general ledgers, sales tax returns with workpapers, Federal tax returns, cash register tapes, purchase invoices, bank statements with deposit tickets and checkbooks. None of these records were provided except those previously made available to the Division as indicated.

In January 1987, the Division requested that Adassa begin saving its cash register tapes and purchase invoices for use in conducting a test period markup audit. Some of these records were kept for several months and given to the auditor; however, in July 1987, the Division was told that no cash register tapes were kept after April 1987. Apparently, the auditor used the records which were provided to calculate a ratio of taxable to nontaxable purchases.

By letter to Mr. Greenblatt dated December 3, 1987, the Division requested Adassa's Federal income tax returns for the years 1983 through 1986. Returns were provided for 1985 and 1986. On or about December 30, 1987, the Division sent workpapers to Mr. Greenblatt showing its estimate of tax due of approximately \$170,000.00. The basis for this estimate is not in the record.

Several discussions between Mr. Greenblatt and the auditors followed after the Division's initial estimate of tax liability. On March 23, 1988, a meeting was held to discuss the audit results. Those present included representatives of the Division, Mr. Greenblatt and Mr. Mustafa. At the meeting, it was agreed that Adassa's sales tax liability would be estimated by a markup of purchases which used the following factors: purchases of \$8,380,384.00 for the period March 1, 1983 through May 31, 1987, a taxable ratio of 18.5 percent and a markup percentage of 22.5. These factors were arrived at through negotiation; however, the parties made use of Adassa's Federal income tax returns for 1985 and 1986 and the decision of the State Tax Commission cited above in their calculations. Specifically, the dollar amount of purchases was derived from the Federal income tax returns and the State Tax Commission decision, and the markup figure was derived from the State Tax Commission decision. The use of these factors resulted in a sales tax liability of \$60,221.00. The Division then prepared two statements of proposed audit adjustment, dated April 29, 1988, one showing tax due for the period March 1, 1983 through May 31, 1987 in the amount of \$60,221.00 plus penalty of \$15,614.20 and interest of \$33,117.99 for a total due of \$108,953.19, and another showing an additional, or Omnibus, penalty of \$1,117.90 for the period September 1, 1985 through May 31, 1987.

On May 25, 1988, Mr. Greenblatt and a Mr. Mustafa² went to the Division's offices, where Mr. Mustafa signed the statements of proposed audit adjustment (which will be referred to from this point on as the "consents") and paid \$10,000.00 of the proposed assessment. Mr. Mustafa's signature appears under the following statement:

"The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this

²The documents in the record indicate that there are two Mr. Mustafas, Abdel (the petitioner here) who is identified as president of Adassa, and Ahmed Mustafa who is identified as secretary of Adassa. Apparently, it was Ahmed Mustafa who signed the statements of proposed audit adjustment.

statement constitutes such a consent. YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT."

The following words are handprinted under Mr. Mustafa's signature: "Subject to request for reduction in penalty assessed. See attached letter." Identical statements appear on the consent summarizing the additional penalty.

The letter referred to on the consents is one addressed to the auditor by Mr. Greenblatt. In pertinent part, it states:

"On behalf of our client we request consideration be given towards reducing the penalties assessed. Our client has signed the proposed audit adjustment and reluctantly has agreed to the tax deficiency determined.

The basis for the request is as follows. The bulk of the tax deficiency determined is for the period of 3/1/83 to 5/31/86. During that period the company was serviced by another accountant who provided no guidance as to proper documentation of the companies [sic] financial activity. You yourself commented on the improvement found on the documentation for the subsequent period. The management of the company is still improving their administration of the paperwork and intends to be functioning properly.

Based on the above facts, and the intent of management goals on improving their record keeping techniques I request, on behalf of Adassa Meat Corp. that the penalty assessed be abated or at least reduced."

In his final report, prepared by the auditor after his review of Mr. Greenblatt's letter of May 25, 1988, the auditor recommended that Adassa be assessed tax, penalty and interest. The Division did not contact Adassa to communicate its decision with regard to Adassa's request for abatement of penalties.

Mr. Greenblatt also sent a letter to the Division, dated May 25, 1988, which states:

"With regard to your tax examination of our client.... As of this point in time the books and records subsequent to May 31, 1987 are not complete. I, therefore, request your audit go up to the period ended May 31, 1987."

On or about September 20, 1988, the Division issued to Adassa three notices and demands for payment of sales and use taxes due. The first notice and demand was for the period March 1, 1983 through August 31, 1986 and shows total tax due of \$57,895.00 plus penalty and interest. The second notice and demand is for the period September 1, 1986

through May 31, 1987 and shows tax due of \$2,326.00 plus penalty and interest. Taken together, the two notices and demands assess tax due of \$60,221.00, as shown on the consents. The first notice states that \$10,000.00 was paid on May 25, 1988, but the amount of tax shown as due was not reduced to reflect that fact. The third notice and demand shows a penalty due for the period September 1, 1985 through May 31, 1987 in the amount of \$1,117.90.

The Division issued to Abdel Mustafa three notices of determination and demands for payment of sales and use taxes due, also dated September 20, 1988. These assessed tax, penalty and interest in identical amounts and for identical periods as those notices and demands issued to Adassa.

The notices of determination, unlike the notices and demands, informed Mr. Mustafa of his right to challenge the determination of tax, penalty and interest through the hearing process.

Adassa executed a series of consents which, as a group, extended the period of limitation for assessment of sales and use taxes for the period March 1, 1983 through May 31, 1985 to September 20, 1988.

Adassa filed a timely petition with the Division of Tax Appeals on November 29, 1988. Abdel Mustafa filed a timely request for a conciliation conference with the Division of Taxation. In November 1989, the Division issued a Conciliation Order sustaining the notices of determination issued to Mr. Mustafa who then filed a petition with the Division of Tax Appeals. These matters were consolidated by the Administrative Law Judge shortly before the hearing commenced and before the Division had an opportunity to file an answer to the petition of Abdel Mustafa.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners maintain that the execution of the consents did not finally and irrevocably fix the tax due, because the consents were conditioned upon the Division's response to Adassa's request for abatement of penalty. It is petitioners' position that, since the Division failed to respond to that request within 60 days of the execution of the consents, the consents never became effective. As a consequence, petitioners argue that the Division had no authority to

issue a notice and demand for tax due to Adassa, but should have issued a notice of determination in accordance with section 1138(a)(1) of the Tax Law.

Based on their position that the notice and demand issued to Adassa is a nullity because it was issued without statutory authority, petitioners argue that the notice of determination issued against Abdel Mustafa must be cancelled, "since it is based solely upon the incorrect Notice served upon the petitioner, Adassa Meat Corp." (Petitioner's Brief at 12-13).

Even if the notices issued to petitioners are not canceled in their entirety, petitioners contend that the tax due was not fixed and that they have the right to challenge the assessments through an administrative proceeding. They contend that they have established that the audit was unreasonable and arbitrary because it failed to adopt the findings of the State Tax Commission decision issued to Adassa in October 1985. This decision relied, in part, on documents provided to the Division of Taxation at a conciliation conference. On the basis of those documents, the Commission found a taxable ratio of purchases of 16.5 percent. Petitioners argue that the facts and circumstances of the first audit and audit now under consideration are nearly identical and, therefore, that the Division is bound by the 16.5 percent taxable ratio found by the Commission on the prior audit.

Petitioners contend that they have established reasonable cause for the failure to report and pay all sales taxes when due. It is their position that their agreement to pay all taxes assessed, both on the prior audit and the present one, demonstrates good faith and a lack of willful neglect. Furthermore, they argue that until the issuance of the State Tax Commission decision in October 1985 the proper method of determining tax due was not established.

Abdel Mustafa conceded that he was a person responsible for collection of sales tax on behalf of Adassa.

The Division argues that the statement printed by Mr. Mustafa on the face of the consent is "precatory in nature and serves only to express petitioners' request for a reduction, not of tax but of penalty only, which request, although initially directed to the Division of Taxation is now a subject for the consideration of the Division of Tax Appeals" (Division's Brief at 6). It is the

Division's position that Adassa consented to the fixing of tax, penalties and interest. In the alternative, the Division contends that Adassa consented to the fixing of tax if not the imposition of penalties, and, therefore, the tax assessed against Adassa is fixed and final.

The Division maintains that, if it is determined that the tax or penalty and interest should have properly been assessed by notice of determination rather than notice and demand, the error was harmless in that it did not confuse, mislead or otherwise prejudice petitioner.

The Division maintains that petitioners have failed to carry their burden of proof to show any error in the audit method or results and that they have not established reasonable cause for abatement of penalties.

CONCLUSIONS OF LAW

A. Section 1138(a)(1) of the Tax Law grants the Commissioner of Taxation and Finance the authority to determine sales and use taxes due if a tax return required by article 28 is not filed or if a tax return when filed is incorrect or insufficient. The Commissioner must give notice of a determination of tax due to the person liable for the collection and payment of the tax. "Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing" (Tax Law § 1138[a][1]).

If the tax due is estimated as provided for in section 1138, the notice of determination of tax due must contain a statement in boldfaced type advising the taxpayer that the amount of the tax was estimated, that the tax may be challenged through the hearing process, and that a petition challenging the assessment must be filed within 90 days (Tax Law § 1138[a][2]).

Pursuant to section 1138(c) of the Tax Law, a person liable for collection of tax is entitled to have the tax due finally and irrevocably fixed (whether or not a notice of determination has been issued) by filing a signed statement in such form as the Commissioner may prescribe consenting to the fixing of tax; however, if a notice of determination has been issued, the consent to fixing of tax must be executed before the expiration of the 90-day period for filing a petition (Tax Law § 1138[c]).

B. The consents executed on behalf of Adassa are essentially a form of waiver. That is,

in consenting to the fixing of tax under section 1138(c) of the Tax Law the taxpayer waives the right to challenge the tax assessment through the administrative hearing process provided for in section 1138(a)(1) of the Tax Law (although the taxpayer may pay the tax and file for a refund pursuant to Tax Law § 1139[c]). Adassa placed a condition upon its consent by adding the following statement to the consent forms: "Subject to request for reduction in penalty assessed. See attached letter." The letter referred to requested an abatement of penalties. Accordingly, the first issue to be resolved requires an interpretation of the consent as modified by Adassa's statement.

By issuing notices and demands for tax, penalty and interest, the Division effectively interpreted Adassa's statement as a complete and unequivocal waiver of all rights to challenge either tax, penalty or interest. This position is untenable because it treats Adassa's statement as a nullity. Certainly, any interpretation of Adassa's statement must give some effect to the words.

Alternatively, the Division contends that, even if Adassa did not waive its right to a hearing to challenge penalty and interest, the tax assessed is fixed and final and not subject to review by the Division of Tax Appeals. The Division characterizes Adassa's statement with regard to penalties as "precatory". This is a word not commonly used outside the law. "Precatory words...are words praying or expressing a desire that a thing be done; usually precatory words are not binding" (Garner, A Dictionary of Modern Legal Usage at 426). In essence then, the Division's position is that Adassa unconditionally consented to the fixing of tax, and, at the same time expressed its desire that the Division consider its request for abatement of penalty. It is the Division's position that, as the abatement of penalties is the subject of this proceeding, Adassa's request has in essence been granted. This position is somewhat disingenuous in light of the fact that the Division issued notices and demands to Adassa, documents which are appropriately issued only when the right to a hearing has been waived or otherwise forfeited.

As stated above, the consents executed by Adassa are essentially a form of waiver. "The

essence of waiver is the intentional relinquishment of a known right. The intent must be clearly established and cannot be inferred from a doubtful or equivocal act and the burden is on the one claiming the waiver of a right to prove it" (Horne v. Radiological Health Services, P.C., 83 Misc 2d 446, 371 NYS2d 948, 961, affd 51 AD2d 544, 379 NYS2d 374 [citations omitted]; see also, Gilbert Frank Corporation v. Federal Insurance Company, 70 NY2d 966, 525 NYS2d 793, 795). It is apparent that Adassa did not intentionally, unequivocally and unconditionally waive its right to a hearing to challenge the tax, penalty and interest assessed. At the very least, the Division's consideration of and response to Adassa's request for abatement of penalty was made a condition precedent to the finalization of the consent. As the Division did not respond to Adassa's request for abatement of penalty, it cannot be said that there was a positive consent to the assessment of tax, penalty or interest above the minimum.

C. The Division argues that if it is decided that Adassa did not consent to the tax, penalty or interest, the appropriate remedy is to treat the notices and demands as notices of determination. This argument was decided by the Tax Appeals Tribunal in Matter of Kayton Specialty Shop (Tax Appeals Tribunal, January 17, 1991), where the Tribunal stated:

"Where there is no agreement by the taxpayer with regard to the amount of taxes due plus interest and penalty, if any, the Division must proceed by mailing a notice of determination to the taxpayer (Tax Law § 1138[a]; 20 NYCRR 535.2[a][b]).... [T]he Division's use of a Notice and Demand to assess [tax, penalty and interest where there is no consent to their assessment] is without a statutory basis, contrary to the Division's own regulations and is null and void."

D. The situation is entirely different with regard to petitioner Abdel Mustafa. Mr. Mustafa conceded that he was a "person required to collect tax" (Tax Law § 1131[1]) on behalf of Adassa. Such persons are "personally liable for the tax imposed, collected or required to be collected under... article [28]" (Tax Law § 1133[a]). Contrary to petitioners' contention, cancellation of the notices and demands issued to Adassa has no bearing on the notices of determination issued to Abdel Mustafa. Therefore, the adequacy of those notices will be addressed.

E. Every person required to collect tax must maintain records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law §

1135[a]; 20 NYCRR 533.2[a]). Among the records required to be maintained are "records of every sale" and the tax due on that sale (Tax Law § 1135[a]; see, Matter of Goldner v. State Tax Commn., 70 AD2d 978, 418 NYS2d 477, lv denied 48 NY2d 608, 423 NYS2d 1025).

Petitioners maintained no records of individual sales, such as cash register tapes, and, in fact, failed to maintain a complete and accurate set of register tapes even when specifically requested to do so. Where such records do not exist, the Division is required to select an audit method reasonably calculated to determine the sales tax due (Tax Law § 1138[a][1]; see, Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, 157). The burden is then placed upon the petitioner to prove by clear and convincing evidence that either the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 859, 446 NYS2d 451, 453).

Petitioners presented no evidence whatsoever of Adassa's sales or purchases for the audit period; instead they make a rather convoluted argument to support their request that taxable sales be recomputed using a taxable ratio of 16.5 percent. Petitioners note that the notices and demands and statements of audit adjustment issued to Adassa state that the tax assessment is based on an audit of Adassa's records. They then argue that the only records available for audit were those relied on by the State Tax Commission in arriving at its determination of taxes due from Adassa for the period December 1, 1979 through February 28, 1983 (see, Matter of Adassa Meat Corp., supra). On this basis, petitioners contend that the 16.5 percent taxable ratio is founded on Adassa's records, while the 18.5 percent figure used by the Division has no foundation in fact and, therefore, lacks a rational basis.

The auditor who conducted the audit of Adassa, present at a meeting also attended by one of Adassa's officers and Adassa's accountant, testified that the various factors used to calculate Adassa's tax liability were arrived at through negotiation between the parties. Adassa's Federal income tax returns, the State Tax Commission decision, and those limited records which were made available for audit were used as sources of information and points of discussion, but ultimately they did not form the basis for the assessment. Petitioners presented no testimony or

other evidence whatsoever to refute the testimony of the auditor or to contradict the conclusion reached here that the tax assessment was the product of negotiations between the parties. Such an assessment does not lack a rational basis (see, Matter of West Gaiety Corporation, Tax Appeals Tribunal, December 8, 1988).

F. Petitioners did not establish that Adassa's failure to pay the correct amount of tax due in a timely manner was due to reasonable cause and was not due to willful neglect (Tax Law § 1145[a][1][i], [vi]). In support of their request for abatement of penalties, the petitioners cite section 536.5(c)(4) of the Commissioner's regulations, setting forth examples of grounds for reasonable cause. The section cited by petitioners states:

"(c) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer or other person.

* * *

(4) A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or a declaratory ruling, a pending conciliation conference proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for a taxable period or periods the return or returns for which are due subsequent to the filing of the petition with the Commissioner of Taxation and Finance, the commencement of the conciliation conference proceeding, the filing of the petition with the Division of Tax Appeals or the commencement of the judicial action or proceeding, provided that:

* * *

(iii) the facts and circumstances for such taxable period or periods are identical or virtually identical to those of the taxable period or periods covered by the petition, action or proceeding."

Petitioners imply that neither they nor the Division knew, or could have known, how to accurately calculate and report taxable sales until the issuance of the State Tax Commission decision. This is a frivolous position. The recordkeeping provisions of article 28 are clear, and the caselaw interpreting those provisions is well established. Adassa's petition to the State Tax Commission raised no new or unsettled issues of law. The mere fact that Adassa had a petition pending with the State Tax Commission does not in itself establish reasonable cause. Moreover, petitioners have not demonstrated that a good faith effort was made to accurately

ascertain Adassa's sales tax liability during the period covered by the instant audit.

G. In accordance with Finding of Fact "9", the payment of \$10,000.00 shall be applied against the tax assessment issued to Abdel Mustafa.

H. The petition of Adassa Meat Corporation is granted, and the notices and demands issued on September 20, 1988 are cancelled.

I. The petition of Abdel Mustafa is granted to the extent indicated in Conclusion of Law "G"; the notices of determination and demands for payment of sales and use taxes due issued on September 20, 1988 shall be modified accordingly; and, in all other respects, the petition is denied.

DATED: Troy, New York
February 28, 1991

ADMINISTRATIVE LAW JUDGE